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91-1786

NO. 91-1786

Supreme Court, U.S.
FILED
JUN 5 1992
OFFICE OF THE CLERK

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

PAUL TANSO,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

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STATEMENT OF THE CASE

This counter-statement of the case is necessitated by the omission of numerous relevant facts in Petitioner's statement of the case. On March 3, 1986, ten days after his arrest for murder, the defendant Paul Tanso was brought before the Boston Municipal Court[1], where, having been denied pre-hearing access to statements of witnesses, his counsel waived a probable cause hearing. Without prior notice, the Commonwealth moved, pursuant to Mass.R. Crim.P., 35, to depose two alleged eyewitnesses to the murder, Joseph Schindler and Richard Storella. The motion was objected to by defense counsel but granted by the Municipal Court judge. The witness Schindler gave direct

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[1]Codefendant Frank DiBenedetto, whose trial was severed from Tanso's, was also present with counsel at the Boston Municipal Court proceedings.

testimony, and defense counsel stated he was not prepared to conduct a cross-examination. Commonwealth v. Tanso, 411 Mass. 640, 642-43, 583 N.E.2d 1247, 1249 (1992), rehearing denied, No. 5121 (Mass. Feb.6, 1992).

The following day, March 4, 1986, the witness Storella gave direct examination, and defense declined to cross-examine Storella at that time. The prosecutor pressed the judge for a finding that the defense had been "given reasonable discovery and reasonable opportunity to be heard and to cross examine," defense counsel opposed such a finding, and the judge refused to make it. The defendant's motion to hold the witness in protective custody was denied, but the judge granted defense discovery motions and continued

the proceeding to March 7, 1986. Id. at 643, 583 N.E.2d at 1249-1250.

On March 7th, after receiving limited discovery from the Commonwealth, defense counsel indicated that despite his best efforts to prepare for cross-examination of the witnesses, he still needed at least one more week. Counsel declared that they were not waiving their client's rights to confront the witnesses. Id. at 643-44, 583 N.E.2d at 1250. A renewed motion to hold Storella in protective custody was denied based on the Commonwealth's assertion that it would continue to protect Storella. The prosecutor opposed any continuance and again pressed the judge for a ruling on waiver. The judge again declined to find any waiver and further declined either to grant or deny a continuance, asserting that he was leaving

each of the parties to their various remedies. Id. The prosecutor continued to press for a colloquy with the defendant as to whether he was knowingly and intelligently waiving his right to cross-examination, the Commonwealth specifically recognizing that, absent the defendant's personal waiver, Storella's deposition could not be used if Storella should became unavailable. The Municipal Court judge refused the prosecutor's request, stating that any such colloquy would presuppose the existence of a waiver, which the judge was unwilling to find. Specifically, the court took pains to clarify that he was not foreclosing the defendants from seeking cross-examination at a later date, stating: "I'm not prepared to say to either of [the

defendants], you either go forward now or you waive your right."

In October, 1986[2], Tanso moved the Superior Court to permit the completion of the depositions through cross-examination. A Superior Court judge ordered the depositions "to continue" for the purpose of cross-examination and redirect. Id. at 644, 583 N.E.2d at 1250. Although at the hearing on this motion the Commonwealth had declared that both witnesses were still available to testify, three weeks later, in the face of the deadline for completing the depositions, the prosecutor claimed that Storella was "unavailable and will remain unavailable for an indefinite time."[3] From that date, December 2, 1986,

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[2]Indictments were returned on May 21, 1986. Id.

[3]Schindler's deposition was completed on December 2, 1992. Id.

through the time of trial, the Commonwealth continued to declare Storella unavailable and his deposition was never completed. Id.

In 1988, Tanso and the Commonwealth filed cross-motions concerning the admissibility of Storella's uncross-examined deposition. Another Superior Court judge, ignoring the implicit findings of his predecessor's ruling on the completion of the deposition, ruled that the Commonwealth could introduce Storella's deposition at Tanso's trial, concluding that Tanso had been provided with an adequate opportunity to cross-examine Storella and that Storella's testimony was sufficiently reliable. This ruling was subject to the Commonwealth's ability to prove Storella's

unavailability. Id. at 644-45, 583 N.E.2d at 1250.

At the hearings on Storella's availability, testimony was elicited from the lead prosecutor, Storella's sister and the chief investigating police officer. The prosecutor said the last time he remembered seeing Storella was at his grand jury appearance in May 1986. He admitted that, after that appearance, he did not remain in touch with Storella but claimed that he kept in touch with Storella's sister. The sister testified that she never received a single call from the prosecutor or any police officer until after her brother disappeared, i.e., the weekend after Thanksgiving, 1986. The prosecutor further testified that following the Superior Court's order of November 6, 1986 (granting the continuance

of the deposition), he did nothing to try to locate Storella until a ten-day interlocutory review appeal period had run, despite the fact that the order required the deposition to be completed by December 5, 1986. At some point after that, he claimed he called the sister only to learn that Storella was away on a trip. It was not until January, 1987, that he instructed the police to try to locate Storella. Evidence of efforts to locate Storella until the issuance of a capias in March, 1987 was also received at the hearing.

The chief investigating officer testified that, before January, 1987, he had no idea that there was any problem and the police custody of Storella had terminated after Storella's grand jury appearance. The officer was told by

Storella's boss that Storella had left his job shortly before Christmas 1986 and never returned. The officer also testified, in sharp contrast to the prosecutor's version of events, that he had seen Storella talking to the prosecutor in the courthouse in November and, again, in the District Attorney's office with the prosecutor in December. The prosecutor denied both encounters and the officer curiously claimed later, at trial, that he was "mistaken" about seeing Storella and the prosecutor together.

The trial judge found that Storella was unavailable[4], and Storella's uncross-examined deposition, with an assistant district attorney reading Storella's

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[4]The court below explicitly did not reach or discuss the issue of whether the witness was unavailable, Id. at 460 n.7, 583 N.E.2d at 1251 n.7

answers, was introduced at Tanso' trial. Id. at 645,583 N.E.2d at 1250.

At trial, the court admitted evidence of cocaine found at a codefendant's residence to corroborate Storella's testimony although said evidence was suppressed from use at that codefendant's severed trial. The judge in the Tanso trial refused to admit evidence that attacked Storella's credibility. Moreover, the trial judge refused to allow the jury to be informed that the deposition testimony did not contain cross-examination and, indeed, erroneously instructed the jury that it did contain cross-examination.

Following Tanso's conviction, Storella miraculously reappeared but Tanso's post-trial motions relating to his reappearance, including a motion seeking

to hold Storella as a material witness and/or for a hearing on his prior unavailability, were denied. Id. at 642 n.3, 583 N.E.2d at 1249 n.3.

The Supreme Judicial Court reversed Tanso's convictions finding that absent an adequate opportunity to cross-examine and either actual cross-examination or a waiver of that right, prior recorded testimony does not satisfy the Confrontation Clause's standards for reliability and may not be introduced at trial. Id. at 646-649, 583 N.E.2d at 1251-1254. Specifically, the court below held that at no time had Tanso expressly waived his right to cross-examine but rather had objected at all times that the Commonwealth claimed that his action's constituted a waiver. Moreover, "the defendant was not given any notice that

failure to cross-examine Storella by a certain date would result in a waiver of the right to cross-examine." Id. at 650, 583 N.E.2d at 1254.

SUMMARY OF THE ARGUMENT

The court below's decision followed the precedent of this Court which requires that waiver of the fundamental right to cross-examination under the Confrontation Clause be knowing and intentional, and the intention must be clear. The record in this case shows precisely the opposite, i.e., the expressed refusal of respondent to waive the right and the refusal of the court to find the respondent waived the right or even to require the respondent to cross-examine or waive.

Moreover, even if a waiver were found to exist, the uncross-examined prior recorded testimony would necessarily be

excluded from evidence because the order admitting it violated the law of the case where another judge required the respondent to be given the opportunity to cross-examine. In addition, the record reveals the prior recorded testimony was unreliable and that the prosecution acted in bad faith in its failure to secure the witness' attendance at his court-ordered continued deposition and at trial. Finally, the trial court's failure to instruct that there was no cross-examination, and, incredibly, to state to the jury that there was cross-examination, compounded the error in admitting the deposition testimony.

ARGUMENT

I. THE SUPREME JUDICIAL COURT'S DECISION IS CONSISTENT WITH CONSTITUTIONAL REQUIREMENTS SET FORTH BY THIS COURT REGARDING THE ADMISSION OF PRIOR RECORDED TESTIMONY OF AN UNAVAILABLE WITNESS.

The Petitioner argues that the Supreme Judicial Court's decision expands a defendant's rights under the Confrontation Clause far beyond the prior decisions of this Court. This is simply not the case. The court below has clearly adhered to this Court's dictates in Pointer v. Texas, 380 U.S. 400, 404-405 (1965). Commonwealth v. Tanso, 411 Mass. at 650, 583 N.E.2d at 1253.

The Commonwealth first argues that the reliability prong of the Ohio v. Roberts, 488 U.S. 56 (1980), test was satisfied because Tanso had an adequate opportunity for cross-examination. Petitioner claims Tanso had received full

discovery and had three days in which to prepare a cross-examination. Petition, at 10.[5] However, the record in this case does not support this conclusion. The court below notes that prior to 5:00 p.m. on March 4, 1986, counsel had only received as discovery "a redacted search warrant, an incident report from the police, and a statement alleged to be a transcript of a tape recorded interview of Schindler," and that the judge had denied Tanso full discovery. Id. at 643 n.6, 583 N.E.2d at 1250 n.6. While the Commonwealth claimed to have provided all discovery by the evening of March 4th,[6]

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[5]References to the Commonwealth of Massachusetts' Petition for Writ of Certiorari are cited as "Petition, at ___."

[6]This, of course, left only two full days before the continued hearing on the morning of March 7th.

the record reveals that there was additional discovery then available which was not disclosed. Moreover, the two days left for preparation of the most critical cross-examinations in this first degree murder case was clearly inadequate time to review the discovery which was disclosed and conduct an investigation.

Most significantly, the "three days" becomes meaningless in light of the Supreme Judicial Court's conclusion that there should have been a hearing held on the time needed for cross-examination. Without such a finding in the record below, there is no possible way to conclude that this period is sufficient for preparation. Nor is the court below's holding that the trial court must determine the time needed for cross-examination and set a date after which

waiver will occur is not inconsistent with prior opinions of this Court. In Delaware v. Fensterer, 474 U.S. 15, 20 (1985), this Court recognized that the Confrontation Clause guarantees an opportunity for effective cross-examination, but such cross-examination need not be effective in every way envisioned by the defense. This Court has consistently maintained, however, that the principle of confrontation means more than being allowed to confront the witness physically. Davis v. Alaska, 415 U.S. 308, 315 (1974).

Further, the waiver of a constitutionally protected right must be knowing and intentional and this Court does "not presume acquiescence in the loss of fundamental rights." Johnson v. Zerbst, 304 U.S. 1019, 1023 (1938). The

Supreme Judicial Court has echoed this language stating that the intention to waive such a constitutional right "must be made clear without implication, inveiglement or subtlety." Commonwealth v. Dustin, 373 Mass. 612, 368 N.E.2d 1388, 1391 (1977). The Court, in reviewing a determination of whether a defendant voluntarily waived his constitutional rights, will consider all surrounding circumstances and make an independent determination as to whether such a waiver occurred. Johnson v. Zerbst, 304 U.S. at 1025; Commonwealth v. Santo, 375 Mass. 299, 376 N.E.2d 866, 869 (1978); Commonwealth v. Jackson, 377 Mass. 319, 386 N.E.2d 151 (1979); Commonwealth v. Westmoreland, 388 Mass. 269, 446 N.E.2d 663 (1983). Additionally, the court below has appropriately indulged every

presumption against the waiver of fundamental constitutional rights and, consequently, there is a heavy burden on the Commonwealth to prove that Tanso made a knowing and intelligent waiver of a constitutional right. Commonwealth v. Watkins, 375 Mass. 472, 379 N.E.2d 1040 (1978); Commonwealth v. Pennellatore, 392 Mass. 382, 467 N.E.2d 820 (1984).

No such waiver is evident on the record below nor could one be inferred from the conduct of Tanso or his defense counsel. Indeed, the record is compelling that the defendant vigorously denied he was to waive his right of cross-examination and the Municipal Court judge just as vigorously declined to find that there was a waiver.

The Commonwealth further attempts to water down the reliability prong of the

Ohio v. Roberts test by mischaracterizing the test as an exception to the hearsay rule. In so doing, the Commonwealth misinterprets this Court's decision in Idaho v. Wright, 110 S.Ct. 3139 (1990), in which it was held that the prohibitions contained within the Confrontation Clause should not be equated with the general rules prohibiting the use of hearsay statements. Id. at 3146; see also White v. Illinois, 112 S.Ct. 736 (1992). Indeed, the Confrontation Clause bars the admission of some evidence that would otherwise be admissible under the hearsay rule. 110 S.Ct. at 3146. In Wright, as in the instant case, the hearsay statements (there, of the defendant's minor child) did not fall within a "firmly rooted" hearsay exception, i.e., co-conspirator statements, such that there is

no need for independent inquiry into reliability. Id. at 3148. Therefore, following its decision in Ohio v. Roberts, at 66, this Court determined that, although there was evidence admitted at trial which tended to corroborate the declarant's hearsay statements, such evidence was no substitute for cross-examination at trial. Wright, 110 S.Ct. at 3150. This Court further stated, in response to the same argument proffered by the Commonwealth in the instant case:

> In short, the use of corroborating evidence to support a hearsay statement's "particularized guarantees to trustworthiness" would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that **cross-examination of the declarant would be of marginal utility.**

Id. (emphasis added.)

Moreover,the fact petitioner claims that six circuits have upheld the admission uncross-examined grand jury testimony is equally unpersuasive in light of this Court's holding in Wright.[7] In fact, one of the six circuits referred to in the Petition, at 17n.6, has reversed its prior decision, in view of Wright and has concluded that Wright reversed all the cases on which Petitioner now relies. United States v. Gomez-Lemos, 939 F.2d 326, 332 (6th Cir.1991). Indeed, the Gomez-Lemos court recognized the inherent unfairness of a rule which allowed the prosecutor to replace live testimony of key witnesses with prior uncross-examined testimony and thereby creating a powerful incentive for prosecutors to plan for or

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[7]See United States v. Zannino, 895 F.2d 1, 6 (1st Cir.1990).

acquiesce to the unavailability of said witnesses. Id. at 333.

The Commonwealth's final argument that the court below erred in rejecting petitioner's claim that Tanso had waived his rights for tactical reasons missed the import of the decision below. The Supreme Judicial Court rejected this argument because it found that so long as the opportunity for cross-examination existed, tactical reasons for failing to cross-examine were immaterial. 411 Mass. 649, 583 N.E.2d at 1253, citing Commonwealth v. DiPietro, 4 Mass.App.Ct. 845, 356 N.E.2d 269 (1976). Because the court below found that no opportunity for cross-examination existed, the issue of tactics becomes even less material. Further, the two cases cited by the Commonwealth, United States v. Johnpoll, 739 F.2d 702 (2d Cir.1984),

and United States v. Zurosky, 614 F.2d 779 (1st Cir.1979), cert. denied, 469 U.S. 1075, rehearing denied, 469 U.S. 11977 (1984), are consistent with the ruling of the court below because, in both of these cases, an opportunity to cross-examine was found, as distinguished from the case at bar.

Therefore, this Court should deny the Petition for a Writ of Certiorari.

II. EVEN IF THIS COURT WERE TO ADOPT PETITIONER'S POSITION, THE QUESTION OF ADMISSIBILITY OF THE PRIOR RECORDED TESTIMONY WOULD NOT BE RESOLVED

Assuming, arguendo, that this Court accepted the Commonwealth's argument that there was a waiver of the right of cross-examination, numerous additional issues necessarily must be addressed prior to a determination that the transcript of Storella's deposition is admissible.

A. The Supreme Judicial Court Did Not Decide Whether The Doctrine Of The Law Of The Case Barred The Trial Judge's Findings That Tanso Has An Opportunity For Cross-Examination

When the Superior Court judge specifically ruled in November, 1986, that the depositions of Schindler and Storella be continued, he considered whether defense counsel had forfeited the opportunity to cross-examination by their delay. The judge inquired of Tanso's counsel what had caused the delay in bringing the motion, to which counsel responded that he had conducted a very extensive investigation. The judge balanced the interests of the Commonwealth and Tanso in ruling to continue the depositions, stating:

> ...It seems to be clear that there was a direct examination; there remains the cross examination, and the question of whether or not in the interest of justice and fully aware

> of the rights of the defendant in assessing to protect their interests as well as that of the government, it is appropriate now in the posture of this case to allow the deposition to continue. I don't have to read Judge Hershfang.

This finding was made in the face of the Commonwealth's argument that Tanso had ample opportunity to cross-examine the witnesses and failed to do so. Therefore, the order to continue the deposition implicitly included the finding that Tanso did not have a sufficient opportunity to cross-examine. The order was never appealed by the Commonwealth.

It is respectfully submitted that this finding established the law of Tanso's case in the Superior Court and the subsequent ruling of another Superior Court Judge finding waiver erred in reversing that well-established law. The law of the case doctrine operates to make

binding upon a court "...a ruling made by a court at the same or higher level during prior stages of the same litigation, unless the ruling has been reversed in the interim." Lacy v. Gardino, 791 F.2d 980, 984 (1st Cir.1986). As this Court has noted, the law of the case doctrine "...posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." Arizona v. California, 460 U.S. 605, 618 (1983).

The Supreme Judicial Court has also held that one judge of the Superior Court could not properly reverse the first judge's ruling or make a different decision. Second Nat. Bank of Malden v. Leary, 284 Mass. 321, 187 N.E. 611, 612 (1933). Under these circumstances it is

clear that the admission of the uncross-examined prior recorded statement improperly reversed the earlier ruling requiring completion of the deposition.

B. The Commonwealth Will Not Be Able To Establish The Reliability Of The Testimony Regardless Of Whether An Opportunity For Cross-Examination Existed.

Idaho v. Wright clearly stands for the proposition that the reliability of the prior recorded testimony may not be corroborated by evidence adduced at trial. 110 S.Ct. at 3150. Storella's testimony was patently unreliable, not only because he was never cross-examined, but because there existed a plethora of inconsistencies between the five prior statements he had given. The inherent unreliability of his testimony would be sufficient alone to foreclose the

introduction of his uncross-examined deposition testimony at trial.

The most important inconsistency in Storella's testimony was Storella's gradual memory failure concerning the weapons the alleged killers possessed, which he described very specifically in his initial statement to the police. This was of crucial importance because it was Tanso's contention that Storella, not he, was one of the killers and, therefore, Storella would have had an intimate familiarity with the weapons. Storella, on the other hand, could not have observed the weapons in such detail at night from a distance of fifteen to twenty feet, where he claimed to be when the shootings occurred.

In his first statement, he claimed that Tanso's codefendants had .380's, one

of which was a Baretta, and that Tanso had a .22 revolver. Realizing the inherent implausibility of his story, Storella adjusted it as he gave additional statements after his first one on February 22, 1986. Ultimately, he claimed that he never told police about a Baretta or a .22 magnum.

The record reveals numerous other equally serious discrepancies. Because Storella's various versions of his stories contain such inherent inconsistencies, his testimony can never be determined to be reliable.

C. The Trial Court Erred In Finding That Storella Was Unavailable.

The other prong of the Ohio v. Roberts test for admissibility was never reached by the Supreme Judicial Court. A witness is not unavailable where the proponent of testimony has engaged in

wrongdoing or had a hand in the witness' unavailability. Mass.R.Crim.P. 35(g). Indeed, this Court has concluded that where a witness' absence was due to the negligence of the prosecution, the witness' prior uncross-examined testimony could not be admitted against the defendant at trial. Motes v. United States, 178 U.S. 458, 474 (1900). More recently, this Court has affirmed this prong of the test where "the challenged out-of-court statements were made in the course of a prior judicial proceeding." White v. Illinois, 112 S.Ct. at 741.

The Supreme Judicial Court has held that a witness' unavailability cannot be established absent this showing of good faith and due diligence. Commonwealth v. Bohannon, 385 Mass. 733, 434 N.E.2d 163, 171 (1982); Commonwealth v. Furtick, 386

Mass. 477, 436 N.E.2d 396, 398 (1982); Commonwealth v. Cook, 12 Mass. App. 920, 423 N.E.2d 1056, 1057 (1981).

It is respectfully submitted that an analysis of the prosecutor's efforts to locate Storella is unnecessary because the Commonwealth was responsible, through its own wrongdoing, for the absence of Storella. United States v. Mann, 590 F.2d 361 (1st Cir.1978). The Commonwealth, in arguing before the Municipal Court in March, 1986 that Storella should not be held in protective custody, offered that it would continue to give Storella protection and even increase its protection of him as a result of his testimony. This protection was to continue through the grand jury proceedings and last through the trial. Clearly, the Municipal Court judge relied

on this representation in denying Tanso's motion to declare Storella a material witness and hold him in protective custody. It is submitted that because the Commonwealth made these representations to the court, it should be held responsible for Storella's later unavailability.

Further, Tanso was denied the fundamental right of cross-examination by the outrageous conduct of the prosecutor and law enforcement officials. The prosecution's case revolved around the two alleged eyewitnesses that were deposed pursuant to Mass.R.Crim.P. 35. Having obtained Storella's direct testimony, it is submitted that the Commonwealth had no intention of allowing him to be subjected to cross-examination. In fact, it was clearly a tactical decision on the part of the prosecutors to obtain just the direct

testimony of Storella in March, 1986, because they knew defense counsel was unprepared to cross-examine him, counsel having waived a probable cause hearing.

Moreover, the Commonwealth was placed on notice that there were important reasons to be suspect of Storella's testimony. On May 8, 1986, counsel for Tanso formally alerted the Commonwealth that Tanso had passed a polygraph examination, indicating that Storella was lying about Tanso's role in the murders. Despite this knowledge, and the knowledge that Tanso had not had an opportunity to cross-examine Storella, the Commonwealth failed to take reasonable steps to secure Storella's presence for trial.

In October of 1986, when Tanso was finally prepared to subject Storella to a meaningful cross-examination, he moved

for, and was granted, an opportunity to do so by a Superior Court judge. The judge ordered cross-examinations to be completed by December 5, 1986. At the hearing on the motion, the Commonwealth represented to the court that both witnesses were still available. However, the Commonwealth's conduct that followed the order allowing the continuation of the deposition is the best evidence of the fact that it never intended to produce Storella for cross-examination. On November 11, 1986, Tanso's counsel, in a letter to the prosecutor, suggested that the cross-examination of Schindler and Storella be conducted on December 1 and 2, 1986, to ensure compliance with the judge's December 5th deadline. The prosecutor was advised that if either of the two witnesses were not going to

voluntarily attend, defense counsel should be so advised and would obtain summonses from the court pursuant to Rule 35. The continued deposition was scheduled for December 2, 1986, and both witnesses were expected to attend. Schindler appeared on December 2, 1986, but the prosecutor announced on that day that "Mr. Storella is unavailable and will remain unavailable for an indefinite time. I expect on a day to day basis to receive updated information as to availability and intend to make counsel aware of his availability as soon as I become aware of it." From this statement and later ones made by the prosecutor, defense counsel was led to believe that the Commonwealth was making a good faith effort to abide by the judge's order.

The record reflects that this could not have been further from the truth. At the "unavailability hearing" held on the eve of trial, the detective in charge of the murder investigation revealed that he did not begin to look, nor was he asked to look, for Storella until January, 1987, nearly two months after the order to produce Storella for cross-examination. The officer also testified that he saw Storella at the courthouse in November and December, 1986, with the prosecutor.

The prosecutor testified at the unavailability hearing that he had seen Storella at his grand jury appearance in May, 1986 and had no recollection of seeing him after that but "may have." He denied seeing him at any time after the November 6, 1986 hearing and specifically claimed that the police officer was

mistaken about seeing Storella in the prosecutor's office in December 1986. His alleged "efforts" at complying with the order consisted of doing nothing to locate Storella for at least 10 days while the Commonwealth decided whether to appeal said order (which it did not) and then learning from Storella's sister that Storella had left home for a short trip "a week or so prior" to the prosecutor's first effort to contact Storella. Storella's sister testified that her brother left on a trip the weekend after Thanksgiving, 1986 (which would have been on or about November 29, 1986) and did not return, a far cry from the prosecutor's account (which would have Storella leaving in early November). She testified that while she had talked to the prosecutor several times on the phone, neither he nor

any police officer called her prior to the time Storella left on Thanksgiving weekend.

The prosecutor's testimony thus substantially conflicted with that of the investigating officer and Storella's sister, and compel a finding that there was a complete absence of a good faith effort to comply with the order or find Storella.

The First Circuit has stated that the government's duty to make the witness available

> ...cannot be satisfied by perfunctory efforts, if the rule is not to sanction the government's procuring depositions of witnesses, especially shaky witnesses, but then to **discourage attempts to bring the witness to trial so long as the government is satisfied with what is in the transcript.**

United States v. Mann, 590 F.2d at 367 (emphasis added). In Mann, the court held

that where the prosecutor failed to protect a witness' availability at trial by placing her in relaxed custody, or by simply restricting her ability to leave the jurisdiction, or by placing her under protective subpoena, the government could not subsequently claim that a good faith search prior to trial established the witnesses unavailability for the purpose of admitting previously recorded testimony. Id. at 366. More importantly, Chief Judge Coffin in his opinion found:

> [I]mplicit, however, in the duty to use reasonable means to procure the presence of an absent witness is the duty to use reasonable means to prevent a present witness from becoming absent.

Id. at 368. Additionally, the court reasoned that where

> . . . the government had such means at its disposal but did not choose to use them . . . [t]he defendant should not suffer the injury from the government's choice. On this

> independent basis we would find that the government failed to demonstrate that the witness was unavailable.

Id.; accord, United States v. Rothbart, 653 F.2d 462, 466 (10th Cir.1981).

In the case at bar, the conduct of the prosecution is even more egregious than those facts in Mann. Here, the prosecution misrepresented material facts to the Superior Court, leading all parties and the court to believe that Storella had disappeared long before he actually had. This action (as well as delayed efforts to locate Storella) on the part of the prosecutor clearly demonstrates that the Commonwealth was content with the record testimony it had obtained from Storella and thus were neither going to permit a continuation of the deposition nor, more importantly, prevent Storella from disappearing before trial.

D. Other Errors Relating To The Admission Of The Uncross-examined Prior Recorded Testimony Denied Respondent A Fair Trial.

Even were this Court to find that the Storella transcript was properly admitted at trial, this Court's inquiry would not end. Numerous errors attendant to the trial court's admission of the testimony served to violate Tanso's due process rights.

First, the trial court refused to instruct the jury that the testimony did not contain cross-examination and, indeed, instructed defense counsel not to argue the lack of cross-examination of Storella to the jury. Second, the trial court refused to allow impeachment of Storella's testimony through the admission of prior inconsistent statements to other witnesses to show Storella's state of mind. Third,

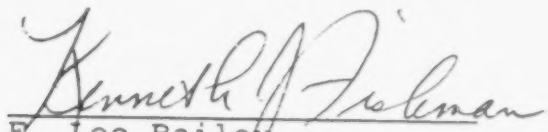
the trial court permitted the Commonwealth to introduce evidence to corroborate Storella's story although even though Storella had never been impeached. Lastly, and perhaps most egregiously, the trial court erroneously instructed the jurors that the testimony actually contained cross-examination when the court granted the jurors request during deliberations to have Storella's testimony read back.

Therefore, the rulings of the trial court served to further bolster Storella's credibility by leaving the jury with the impression that Storella's story was unimpeachable and corroborated by other evidence, in clear violation of Tanso's right to a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should deny the Commonwealth's Petition for a Writ of Certiorari.

Respectfully submitted,



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